

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID A. CANAS,

Defendant and Appellant.

B213063

(Los Angeles County
Super. Ct. No. TA093269)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Meyer, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant David A. Canas was charged with and convicted of assault with intent to commit rape (count 1) and forcible sodomy (count 2). He was sentenced to seven years four months in prison. He contends that (1) there was insufficient evidence of sodomy, and (2) both counts must be reversed because the trial court refused to instruct on lesser included offenses.

We find no error and affirm.

FACTS

1. Prosecution Evidence

Appellant worked at a Jack in the Box restaurant where the victim, Jodi A., often bought coffee. On the afternoon of the incident, Jodi and appellant had a friendly conversation, outside the restaurant, regarding people who used to work there. Appellant suddenly pulled Jodi by the wrist into the trash dumpster area and closed the gate. Ignoring her protests and resistance, he pulled down her lower clothing, tried unsuccessfully to put his penis into her vagina, forcefully opened her buttocks, and put his penis into her anus. After he ejaculated, he wiped himself off, told her to stay where she was, and returned to work inside the restaurant.

Jodi did not initially report what happened because she was scared and she thought people would not believe her. She cleaned herself up and rejoined her girlfriend inside the restaurant. The girlfriend noticed that Jodi was upset but did not know why. The next day, Jodi described the incident to friends, to her brother, and then to the police. A sexual assault examination showed that her wrist, buttocks and labia were bruised. She told the nurse who examined her that appellant's penis had penetrated her anus. The nurse did not observe bleeding, abrasions, redness or tears in Jodi's anal area, but the absence of such symptoms is common in sodomy cases, as anal injuries heal rapidly.

Laboratory testing showed that appellant's semen was present on the clothes Jodi wore during the incident.

Appellant was twice interviewed by police detectives. During the first interview, he said Jodi instigated a consensual sexual encounter. During the second interview, he admitted that he lied at the first interview. He confessed that he pulled Jodi into the trash

area, was not successful when he tried to insert his penis into her vagina, but successfully inserted his penis into her anus. He also admitted that he ignored Jodi's resistance and her requests that he stop.

2. Defense Evidence

A medical doctor who specializes in obstetrics and gynecology testified that, from his review of the records and photos, there was "no medical evidence of penanal penetration" or of "vaginal trauma."

DISCUSSION

1. Sufficiency of the Evidence of Sodomy

"Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (Pen. Code, § 286, subd. (a); see also *People v. Farnam* (2002) 28 Cal.4th 107, 143-144; *People v. Thomas* (1986) 180 Cal.App.3d 47, 54-56.)

Utilizing the appropriate standard of review (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), we find substantial evidence to support appellant's conviction for forcible sodomy, as Jodi testified that she felt appellant's penis inside her anus, she had bruises that substantiated her testimony, appellant's semen was found on her clothes, and appellant confessed that he inserted his penis into her anus.

2. Instructions on Lesser Included Offenses

Appellant relied on a defense of consent. However, his counsel asked the trial court to instruct on simple assault and battery, as lesser included offenses of the charged crimes of assault with intent to commit rape and sodomy. The trial court found no evidentiary basis for instructing on the lesser included offenses, as appellant either committed the charged crimes, or he committed no crimes at all.

"[T]he trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.]" (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 256.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. . . . [¶] . . . 'Substantial evidence' in this context is "evidence from which a jury composed

of reasonable [persons] could . . . conclude[]” that the lesser offense, but not the greater, was committed. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

As the trial court recognized, appellant was either guilty of the charged sex crimes, or he was not guilty. Because there was no evidence from which the jury could conclude that appellant committed the lesser offenses, and not the greater, the trial court did not err when it refused to instruct on lesser included offenses.

Moreover, in view of the overwhelming evidence of appellant’s guilt, including his confession to the crimes, he suffered no possible prejudice from the lack of instructions on lesser included offenses assuming *arguendo* that such instructions should have been given.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.